IP 06-1560-C Y/K Wallace v Hounshel [4]
Magistrate Tim A. Baker Signed on 07/03/08

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CECELIA WALLACE,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:06-cv-01560-WTL-TAB
	)	
JERRY HOUNSHEL,	)	
MARC LAHRMAN,	)	
FAISAL AHMED,	)	
ADVANCED CORRECTIONAL	)	
HEALTHCARE, INC.,	)	
MISSY ROBINSON,	)	
DAVID RIDLEN,	)	
JOSH TEIPEN,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CECILIA WALLACE, individually, and as the executor of the estate of WILLIAM M. WALLACE (deceased), Plaintiffs,	)	
vs.	)	1:06-cv-1560- RLY-TAB
JERRY HOUNSHEL, SHERIFF OF JACKSON COUNTY, et al., Defendants.	)	

ORDER ON PLAINTIFFS' MOTION TO COMPEL EXPERT DISCLOSURES

I. Introduction.

Plaintiff Cecilia Wallace is suing several county employees, medical personnel, and Advanced Correctional Healthcare, Inc. ("ACH") for the death of her son, William Wallace, who died from a heart attack while in the Jackson County Jail. On February 15, 2008, Defendants timely disclosed Drs. Faisal Ahmed and Norman Johnson as expert witnesses. The dispute presently before the Court is whether these witnesses must produce expert reports and related disclosures. Dr. Ahmed, a named defendant, ordered medications for William during a brief telephone consultation with jail personnel. Dr. Johnson is the president of ACH and its corporate designee for purposes of Federal Rule of Civil Procedure 30(b)(6). Plaintiffs move to compel Defendants to provide expert reports and disclosures for Drs. Ahmed and Johnson pursuant to Federal Rule of Civil Procedure 26(a)(2), but Defendants claim that the rule does not require such reports and disclosures. For the reasons discussed below, Plaintiffs' motion [Docket No. 87] is denied.

II. Discussion.

The dispute in this case is over the applicability of Federal Rule of Civil Procedure 26(a)(2)(B), which provides:

> Unless otherwise stipulated or ordered by the court, [the disclosure of an expert witness required by Rule 26(a)(2)(A)] must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony.

The Seventh Circuit explains that while "*all* witnesses who are to give expert testimony under the Federal Rules of Evidence must be disclosed under *Rule 26(a)(2)(A)*; only those witnesses '*retained or specially employed to provide expert testimony*' must submit an expert report complying with *Rule 26(a)(2)(B).*" *Musser v. Genetiva Health Services*, 356 F.3d 751, 756-57 (7th Cir. 2004). Additionally, the Seventh Circuit points out that the commentary on Rule 26 "supports this textual distinction between retained experts and witnesses providing expert testimony because of their involvement in the facts of the case: a 'treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report.'" *Id*. at 757 (quoting Fed. R. Civ. P. 26 advisory committee's note).

Plaintiffs argue that Defendants are trying "to slide Dr. Johnson and Dr. Ahmed past the disclosure requirements" and suggest that such "trial-by-ambush" tactics should not be allowed. [Docket No. 88 at 3.] As for Dr. Johnson, Plaintiffs contend that his "opinion . . . is clearly one based upon a review of records and materials through the course of litigation, and not one of a treating physician." [Docket No. 88 at 8.] Likewise, Plaintiffs maintain that because Dr. Ahmed never saw the decedent but was only consulted over the phone, he should not be considered a treating physician and should be required to provide a report based on the Seventh Circuit's note in *Musser* that "some district courts have suggested that if the *Rule 26(a)(2)(A)* testimony

exceeds the scope of treatment and ventures into more general expert opinion testimony, a report may be necessary." *Musser*, 356 F.3d at 758 n.3. Furthermore, Plaintiffs point out that neither doctor has specialized knowledge in cardiac care, so neither should be permitted to testify as experts in this case.[1]

Defendants argue that the Rule 26(a)(2)(A) report requirement does not apply to Drs. Ahmed and Johnson because neither were retained with an eye toward this litigation, both are employees of ACH, and neither serve as expert witnesses as part of their normal job duties. [Docket No. 90 at 3.] Defendants further suggest that because Dr. Ahmed and ACH are being sued for the medical care provided to the decedent, the role of these doctors in this case is as treating physicians.

Plaintiffs' accusation that Defendants are attempting to ambush Plaintiffs by not providing these reports is without support. Defendants disclosed their expert witnesses timely and had no obligation until then to provide or claim exemption from providing expert reports.

Plaintiffs' main argument is that neither Drs. Ahmed nor Johnson were treating physicians, and therefore an expert report is required of both of them. Indeed, the record indicates that while both Dr. Ahmed and Dr. Johnson are physicians, their treatment of William Wallace is limited at best. Dr. Ahmed's experience with William was a fifteen second phone call with the jail regarding a particular health complaint. As for Dr. Johnson—whose deposition testimony was based largely on a review of William's medical charts, a letter from Plaintiff's

[1] Plaintiffs call into question Drs. Johnson and Ahmed's expertise in cardiology for the purpose of establishing that Plaintiffs are prejudiced because they do not have reports from these doctors. [Docket No. 88 at 7, 9; Docket No. 91 at 3.] While Plaintiffs' motion asks that these doctors be stricken because they have not provided the reports, the motion makes no request that the Court rule on the topics for which these doctors are qualified to testify.

counsel, his own CV, a training manual, the contract file, Dr. Ahmed's schedule, and Plaintiff's expert report—his relationship to William is even more remote.

However, Plaintiffs' argument unnecessarily limits the parameters of Rule 26(a)(2)(B). Plaintiffs argue that "with respect to doctors, the distinction between witnesses required to submit a report and those not required to do so has historically hinged on distinctions between treating and non-treating physicians." [Docket No. 88.] Yet the Seventh Circuit points out in *Musser* that the example of a treating physician being exempt from the report requirement demonstrates the broader point that the critical distinction is between those experts who are retained solely for their expert knowledge and those experts who are involved in the facts of the case. It is possible for a physician to be directly involved in the facts of a situation without necessarily being the treating physician.

For example, the Tenth Circuit addressed a situation in *Watson v. United States*, 485 F.3d 1100 (2007), that is factually very similar to the case at bar and determined that an expert report was not necessary. In *Watson*, Dr. Goforth was not the treating physician but was employed as a medical director for the Bureau of Prisons. The defendants intended for him to testify "about the delivery of care in a prison setting and for him to give his opinion about whether the United States met that standard of care when it treated Plaintiff." *Watson v. United States*, No. CIV-04-537-C, 2005 U.S. Dist. LEXIS 9242, at *3 (W.D. Okla. May 5, 2005). The district court concluded that Dr. Goforth, who does not regularly offer testimony as part of his job, was "not required to submit an expert report under the plain language of Rule 26." *Id*. at *2-3. The Tenth Circuit affirmed, determining that Dr. Goforth met the exact description found in Rule 26(a)(2)(B). *Watson*, 485 F.3d at 1107. While not binding on this Court, the straightforward application of the rule in *Watson*, which is nearly factually identical to the case

at bar, deserves careful and respectful consideration. *See 330 West Hubbard Rest. Corp. v. United States*, 203 F.3d 990, 994 (7th Cir. 2000); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987).

Turning to the specific language of the rule, the report requirement applies to an expert who is: (1) "retained or specially employed to provide expert testimony;" or (2) "whose duties as the party's employee regularly involve giving expert testimony." *See* Rule 26(a)(2)(B). Neither doctor was retained to provide expert testimony as both doctors had some degree of involvement in the facts of this case. Dr. Ahmed provided limited treatment to William, and Dr. Johnson—as president of ACH—was ultimately a key person responsible for ensuring that healthcare was provided for inmates during the time period in which William died. Furthermore, Defendants have specifically represented to the Court that neither doctors' employment duties regularly involve giving expert testimony. [Docket No. 90 at 3.] Accordingly, Drs. Ahmed and Johnson are not required to provide expert reports. This conclusion does not eliminate the requirement that the doctors establish their expertise for the topics for which they are being offered to testify, but that is an issue for another day.

While expert reports for these doctors are not required, Defendants' safer approach is to provide them. *See Martin v. CSX Transp. Inc.*, 215 F.R.D. 554, 557 n.3 (S.D. Ind. 2003) ("The safest (though perhaps not the most cost effective) approach for counsel seeking to elicit trial testimony from a treating physician that strays from the core of that treatment is to produce an expert report."). Failing to provide expert reports leaves open the possibility that the trial judge may limit these doctors' testimony to the detriment of Defendants' case. However, this is a strategic decision Defendants have made. Defendants' strategy does not mandate compelling the production of expert witness reports.

This does not mean, however, that Plaintiffs are not entitled to any relief at this juncture. While it is true that Defendants timely disclosed Drs. Ahmed and Johnson as expert witnesses on February 15, 2008, it is also true that Plaintiff deposed Dr. Ahmed on July 18, 2007. Thus, Plaintiffs did not know at the time of Dr. Ahmed's deposition that Defendants would designate him as an expert witness.[2] While Plaintiffs could have waited until after the expert witness deadline to depose Dr. Ahmed, they were not required to do so. It certainly was not unreasonable for Plaintiffs to presume Dr. Ahmed would not be designated as an expert witness (and thus to proceed deliberately with his deposition) given Dr. Ahmed's limited involvement with William. Moreover, Plaintiffs should not be disadvantaged for deposing Dr. Ahmed early in the case and thus proceeding with discovery in a timely fashion. Accordingly, given Dr. Ahmed's recent designation as an expert witness, Plaintiffs are entitled to conduct a supplemental deposition of Dr. Ahmed. The cost of this deposition shall be allocated in the same fashion as utilized for Dr. Ahmed's original deposition, with each side to bear its own attorney's fees.

This limited relief does not entitle Plaintiffs to an award of attorney's fees in connection with bringing this motion, which request is denied along with all other requests by Plaintiffs for additional relief.

III. Conclusion.

For the above reasons, expert reports are not required of Drs. Ahmed and Johnson, and thus Plaintiffs' motion to compel [Docket No. 87] is denied. However, Plaintiffs shall be

[2] Plaintiffs deposed Dr. Johnson on March 20, 2008, and therefore were aware at the time of his deposition that Defendants had designated him as an expert witness.

afforded an opportunity to conduct a supplemental deposition of Dr. Ahmed.

Dated: July 3, 2008

/s/ Tim A. Baker
Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

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